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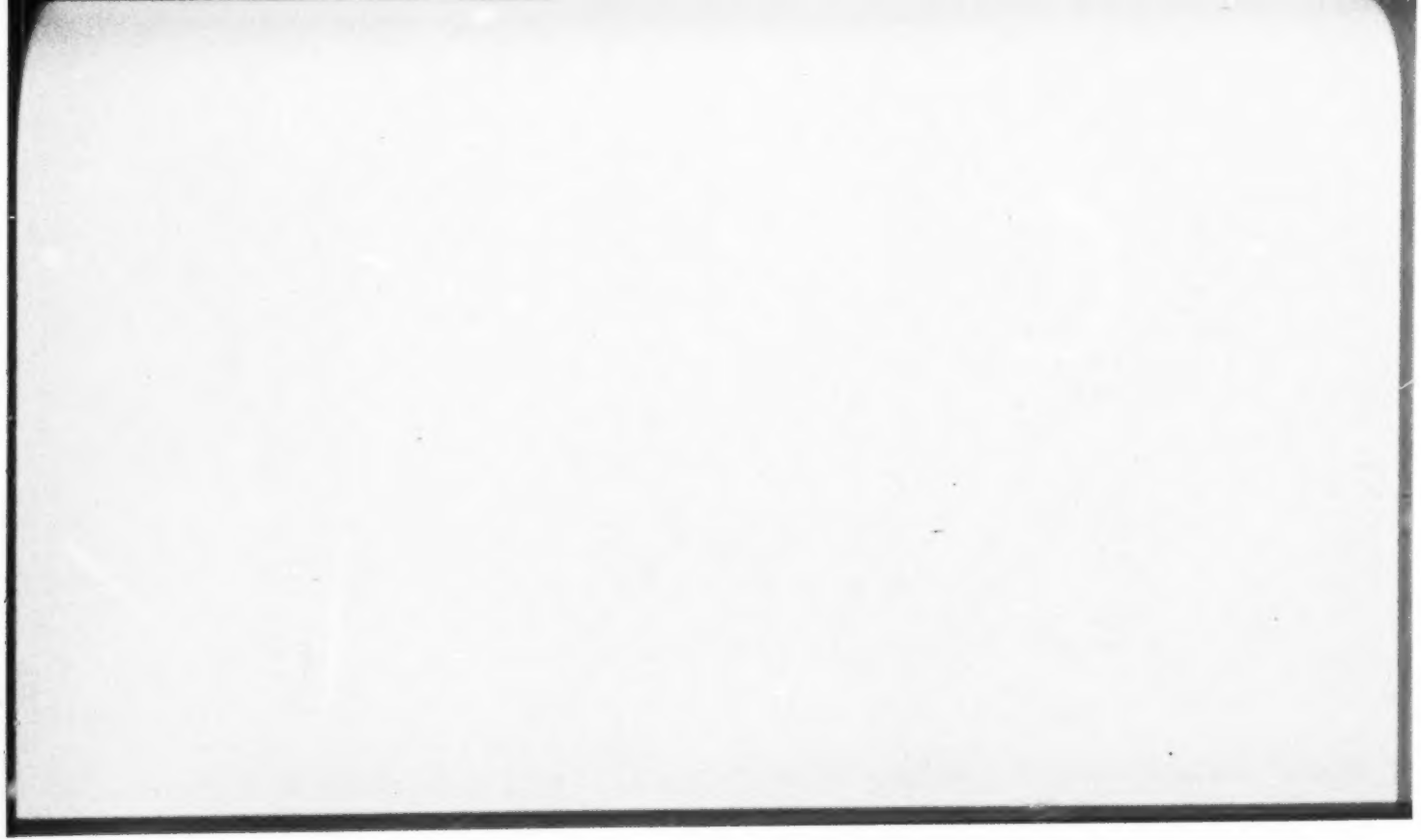

In the Supreme Court of the United States

OCTOBER TERM, 1926

ELIZABETH F. SHUKERT AND ISABEL C. SHUKERT, Executrices of the Estate of Gustave E. Shukert, Deceased, Petitioners

v.

ARTHUR B. ALLEN, COLLECTOR OF INTERNAL REVENUE for the District of Nebraska

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS OF THE COURTS BELOW

The District Court, when directing a verdict, delivered an opinion (R. 117) which is reported in 300 Fed. 754. The opinion of the Circuit Court of Appeals (R. 123) is found in 6 F. (2d) 551.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 126) was entered May 15, 1925. Petition for certiorari was filed August 1, 1925, and granted October 19, 1925, pursuant to Section 240 of the

Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTION

This case presents the question of the proper construction of Section 402 (c) of the Revenue Act of 1918, and more particularly turns upon the meaning of the phrase "intended to take effect in possession or enjoyment at or after death" as used in that section, and as applied to a trust created by Gustave E. Shukert in his lifetime, by which he parted with all interest in the property involved, but postponed all possession, use, or enjoyment by the beneficiaries of principal or income to a date which in the normal course of events would be, was intended to be, and as events turned out was, subsequent to his death.

STATEMENT

This action was instituted in the United States District Court for the District of Nebraska on February 26, 1924 (R. 1), by Elizabeth F. Shukert and Isabel C. Shukert, Executrices of the estate of Gustave E. Shukert, deceased, as plaintiffs, against Arthur B. Allen, Collector of Internal Revenue for the District of Nebraska, to recover an additional Federal estate tax in the sum of $13,685.47, with interest thereon, alleged to have been erroneously assessed and collected as a Federal estate tax imposed upon the transfer of the net estate of Gustave E. Shukert under the Revenue Act of 1918. The case was tried before a jury

(R. 13) and the court directed a verdict in favor of defendant below (R. 119), and upon the verdict judgment was entered. (R. 14.) The Circuit Court of Appeals affirmed the judgment of the District Court. (R. 127.)

From the evidence in this case it appears that Gustave E. Shukert died testate on September 29, 1921, at Omaha, Nebraska. (R. 35.) Shortly prior to May 5, 1921, he sold a piece of real estate for the sum of $225,000; $35,000 of the purchase price was paid in cash. The balance of $190,000 was secured by a mortgage and was evidenced by ten notes payable, respectively, in one, two, three, four, five, six, seven, eight, nine, and ten years, each for $5,000, and one for $140,000 payable in thirty years. (R. 43.)

On May 5, 1921, Mr. Shukert transferred the proceeds of this sale to the United States Trust Company in trust for the following purposes (R. 22):

> 1. The income from this Trust Fund shall be allowed to accumulate and be reinvested in order to increase the principal thereof, provided, however, that in case of extreme destitution and lack of the necessities of life by the wife of the Founder or of any of the beneficiaries hereinafter named, such person or persons may be allowed from the income of this Trust Fund a sufficient sum to pay for the bare necessities of life, such sum in no event to exceed Two Hundred and Fifty ($250.00) Dollars in any one month and for that month only, and in any event no such payment shall be made without written

consent thereto first having been given by the wife of the Founder if living, and a majority of the adult beneficiaries; provided, in the event of a tie between those giving, and those failing or refusing to give such written consent, the Trustee, subject to the foregoing limitations as to necessity, amount and time, may act according to its discretion. * * *

2. This Trust shall terminate on the first day of February, 1951, unless the death of the last survivor of the beneficiaries hereinafter named shall have occurred more than twenty-one (21) years prior to February first, 1951, in which case it shall terminate twenty-one (21) years from and after the death of the last survivor aforesaid. At the termination of this Trust all of the principal and undistributed income shall be paid to and divided among Isabel C. Shukert, Gustave Emil Shukert, Jr., and Flora G. Shukert, the children of the Founder, share and share alike. In the event that any of the above-named children of the Founder shall die leaving issue before the termination of this Trust then the share in said Trust Fund of the one so dying shall go to such issue, if one the whole, if more than one then in equal shares, provided, however, that such issues shall have attained the age of twenty-one (21) years. In case they have not attained this age, then their share is to be held in trust for their use and benefit until they shall have attained the age of twenty-one (21) years. In case any of the above-named beneficiaries shall die without issue before the

> termination of this Trust, then the share he or she would have taken if living shall be divided among the surviving beneficiaries per stirpes and not per capita.

It appears from the evidence that at the time this trust was created Mr. Shukert had a life expectancy of about seventeen years. It also appears that he did not expect to be alive at the time the beneficiaries came into possession and enjoyment of the trust property. (R. 40, 46, 47, 48, 64, 105, 106, 69.)

This evidence also shows that Mr. Shukert intended that the possession and enjoyment of the corpus and accumulated income of this trust fund should not come into the possession and enjoyment of the beneficiaries until after his death.

In making the return required by the Federal Estate Tax Act the executors did not include the value of the securities transferred to the trust in decedent's gross estate. (R. 2, 70.) Upon review and reaudit the Commissioner of Internal Revenue determined that this value was a part of the gross estate and thereupon increased the gross estate by the value of the said securities, that is by $225,000, and assessed an additional tax amounting to $13,685.47 by reason of this increase. (R. 99.) The executors paid the additional tax under protest and brought this suit to recover. (R. 5.)

STATUTES

The Revenue Act of 1918, ch. 18, 40 Stat. 1057, 1097, provides, so far as applicable to this case, as follows:

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * *.

SUMMARY OF THE ARGUMENT

The intention of Congress, as well as the letter of the law, requires that there shall be included in a decedent's gross estate, the value of all property with respect to which he has made a transfer or created a trust which in substance and effect, though not in form, is testamentary. The trust in this case is in substance and effect testamentary because it postpones the ordinary incidents of ownership

until the donor's death, and, in fact is, and was intended to be, a post-mortem disposition of property.

The case differs from *Nichols* v. *Coolidge,* recently argued in this Court, in several respects which emphasizes the testamentary character of the gift involved in this case.

1. No constitutional objection to the Government's construction is urged in this case by the petitioners.

2. The donor in this case expressed his testamentary intent not only by the form of his gift but also by his declarations.

3. The beneficiaries in this case had no enjoyment whatever of either the income or corpus of the gift during the donor's lifetime.

4. In this case not only was the possession and enjoyment of both corpus and income postponed, but also the beneficiaries could not be ascertained until after the donor's death, and, therefore, the gift was not completed before death.

5. The time of enjoyment and possession was fixed in this case with reference to the donor's death not as the limitation of a preceding estate but in aid of the testamentary plan of the donor.

The cases relied upon by the petitioners do not sustain their position because the facts giving rise to those cases are different in almost every respect from the facts involved in the case at bar and because those cases do not call for an application of the principle contended for by the Government

in the case at bar. On the other hand, those cases which are similar on the facts to the case at bar fully sustain the Government's position.

ARGUMENT

The petitioners predicate their construction of Section 402 (c) upon the nature and purpose of the Federal Estate Tax Act. This matter was discussed, from the Government's viewpoint, in the case of *Nichols* v. *Coolidge,* recently argued in this Court. (No. 88, October Term, 1926, argued January 6th and 7th, 1927.) It was there urged that the tax was imposed upon the transfer of a decedent's net estate, and, therefore, upon the transfer at death of the decedent's own property, and not upon those transfers completed prior to death by gifts *inter vivos* or other means. Also that the property, the transfer of which gives rise to the tax, is the decedent's own property, and, therefore, not the property valued for the purpose of determining the value of the gross estate. The transfers and property included by Congress in the valuation of the gross estate were so included in order that the measure of the tax should operate in such a way not only that tax evasions might be prevented, but also that an equal tax burden should be imposed upon those who dispose of their property by will or intestacy and those who accomplish the same end, namely, the conferring of a benefit at death, by other means such as trusts which deprive the beneficiary of the

possession or enjoyment of the subject matter of the gift until the donor dies.

The instant case differs from the *Coolidge Case* in the following respects:

1. In this case the decedent died September 29, 1921, and the tax was imposed by and under the Revenue Act of 1918. (Ch. 18, 40 Stat. 1057.) The trust was created on May 5, 1921, while the Revenue Act of 1918 was in effect. There is, therefore, no occasion to apply or construe the provision of Section 402 (c) so that it shall apply to trusts made before the passage of the Act and the case presents no constitutional question resulting from retroactive application.

2. In the *Coolidge Case* the testamentary character of the gift (we are referring to the trust, not to the conveyance of real estate involved in that case) must be determined solely from its terms which postponed the beneficiaries' enjoyment until the donor's death. In the instant case the testamentary character of the gift is emphasized to the point of certainty by the declarations and expressed intention of the founder. These declarations of testamentary intention as disclosed by the evidence are quoted in the Appendix to this brief. In substance they show that the founder created this trust for the sole purpose of making provision for his family after his death.

3. In the *Coolidge Case* (again referring to the trust, not to the conveyance of real estate) there were

two gifts, one of the corpus to come into the possession of the beneficiaries at or after the founder's death, the other a present gift of the income from that corpus during the founder's lifetime. Considering the two gifts involved in the Coolidge Trust as one, the effect of the transaction was to give the beneficiaries a very limited partial enjoyment of the corpus during the founder's lifetime, with full possession and enjoyment vested at or after the founder's death. In the instant case there is but one gift, intended to confer no benefit, possession, or enjoyment until after the founder dies. Possession and enjoyment of both the income and the corpus is postponed, and the purpose of the postponement is expressly stated by the founder to be a purpose to make a gift after death.

4. The *Coolidge Case* presented the question whether it was the intention of Congress to include those trusts under which all interest in the trust property passed out of the founder before his death. The Government there contended and here contends that the reservation of an interest in the trust property is not the criterion set by Congress because it said that the interest *transferred* shall be included in the gross estate, and this is the antithesis of saying (as it might easily have said if it so intended) that where the founder retains an interest in the trust property it shall be included in the gross estate. If the Government is correct in this contention it is decisive of the instant case, for

here there was *no* enjoyment or possession of either income or corpus until after the founder died.

The answer to the question propounded by the Coolidge Trust, if adverse to the Government's contention, does not, however, decide the instant case. There is, in the instant case, no present gift. Not only are the beneficiaries expressly prevented from using, controlling, and disposing of the property and its earnings, but also in the normal course of events the beneficiaries could not be ascertained until after the founder's death. This is relied upon by the court below, and is hardly disputed in the petitioner's brief. He contends that there is a vested interest on the theory that "there is a present right to a future possession." (Petitioners' brief, p. 34.) But even if there is such a present right (and clearly there is not), it could not be contended that a person whose "present right to a future possession" is defeated so that neither he nor any of his heirs ever has the use, possession, benefit or disposal or control of the property or its earnings, ever takes the property or benefits by the supposed gift. The gift is not, and is not intended to be, complete until after the donor's death.

Wright v. *Blakeslee,* 101 U. S. 174.
Mason v. *Sargent,* 104 U. S. 689.
Clapp v. *Mason,* 94 U. S. 589.

5. The final distinction between the instant case and the *Coolidge Case* is found in the fact that the Coolidge Trust is by its terms to terminate at or

after the founder's death, while in the instant case evidence outside the instrument is necessary to show that the date fixed for distribution was selected because it was after the founder's death, and that the founder intended the trust to take effect in possession or enjoyment at or after his death. In this respect the instant case is similar to the case of *Armstrong, Admr.* v. *State,* 72 Ind. App. 303, and *Matter of Schmidlapp,* 236 N. Y. 278, in which cases it is held that if the facts and circumstances shown by the evidence reasonably authorize the inference that in fixing the date of distribution the grantor contemplated that his death would occur on or before the date named, the transfer is one intended to take effect in possession or enjoyment at or after death if the other characteristics of such a transfer appear.

In this case the evidence is clear that the donor intended to postpone the possession and enjoyment until after his death. The District Court found undisputed evidence of this intention. (R. 119.) The Circuit Court of Appeals expressly affirmed this finding (R. 125), and the petitioners do not dispute it.

The important feature of the selection of a day certain for the termination of this trust is that it discloses that the purpose of the founder was testamentary. The trust was terminated not as a limitation upon an estate preceding the beneficiaries' enjoyment, but in furtherance of Mr. Shukert's testa-

mentary plan. That plan, as he stated it, was that his death should leave his family in control and possession of a part only of his property. The balance, viz., the trust property, was to come to them in their old age to protect them from the result of a possible injudicious use of that property given to them at death. The plan is clear. It is laudable. It is wise. It assures the consummation of Mr. Shukert's purpose as no will, which might be contested, could do. But it is testamentary in its scope and purpose, and for this reason, not because there is any evasion, or attempted evasion of tax, it is within the Statute.

The petitioner's position is stated in his brief at Page 19 as follows:

> We contend that Sec. 402 (c), relating to transfers intended to take effect in possession or enjoyment, etc., should be construed to define this class of transfers exclusively,—that is, transfers wherein possession or enjoyment is retained by the grantor until his death. * * *

So limited, the Statute does not accomplish either its purpose to equalize taxes or to prevent evasions. Manifestly the device adopted by this decedent would be adopted by many men as an easy means of avoiding the tax. That property which they do not need for their use will be placed in the custody of trustees and allowed to accumulate for the benefit of their heirs. So far as the heirs are concerned, and so far as the donor is concerned, such an ar-

rangement differs but little in theory, and not at all in practice, from the case in which the property remains in the custody of the donor himself accumulating earnings for the benefit of the donor's heirs.

However, as pointed out in the *Coolidge Case,* the State courts have consistently held that trusts of this general nature, namely, those in which the founder reserves no interest to himself, are within the phrase "intended to take effect in possession or enjoyment at or after death" if the corpus is distributable at or after the founder's death.

The cases cited by the petitioners to sustain their contention are entirely different on their facts from the case at bar. They fall into two general classes. First, those in which the donor received, in fact or in effect, the income from the property during his life. Such cases are within the Statute for two reasons. As stated by the Circuit Court of Appeals for the Third Circuit in *McCaughn* v. *Girard Trust Company,* 11 F. (2d) 520, the first reason is because the exclusive possession or enjoyment is in the donor for life, and the second equally efficacious reason is because the donor intended and provided that so far as the donee's possession and enjoyment was concerned the gift should not take effect until after the death of the donor. The postponement of the donee's possession and enjoyment is such a postponement of the ordinary incidents of ownership as to make it a

post-mortem disposition of property, and, therefore, it is not only within the letter but also within the spirit, intent, and purpose of the Act. (11 F. (2d) 521.)

The second class of cases referred to by the petitioners consists of those in which the termination of the trust and distribution of the corpus do not happen at or after the *decedent's* death, but at or after some third person's death. In other words these cases concern trusts which provide for the payment of an income to the beneficiary for the beneficiary's life, and a distribution at or after that beneficiary's death. The following cases cited by the petitioners fall within this class:

Dolan's Estate, 279 Pa. 582.

In re Cochrane's Estate, 117 Misc. Rep. 18, 190 N. Y. Supp. 895, affd. *per curiam* 202 App. Div. 751. 194 N. Y. Supp. 924.

People v. *Kelley,* 218 Ill. 509.

Dexter v. *Treasurer & Receiver General,* 243 Mass. 523.

In each of the foregoing cases, moreover, the court was not considering the question whether the remainder was within the statute but was considering the question whether the life estate should be taxed.

The case of *People* v. *Estate of Moir,* 207 Ill. 180, did not concern a trust, but was a case in which the donees were put into actual possession and enjoyment of the property.

The insurance cases are not analogous to the instant case because the beneficiary has immediately upon being named all the possession and enjoyment to which a life-insurance contract is susceptible.

The excerpt from the opinion in *Cochrane's Estate, supra,* quoted on page 25 of the petitioners' brief, is interesting because the learned Surrogate who is quoted is in entire disagreement with the Surrogate, presumably equally learned, who said in the case of *In re Patterson's Estate,* 127 N. Y. Supp. 284, 286:

> * * * I believe that the authorities sustain the proposition that a trust deed giving all the income of an estate to beneficiaries for the life of the grantor and the corpus at grantor's death, is, so far as the corpus is concerned, a transfer intended to take effect in possession and enjoyment at the death of grantor, and therefore taxable. In such a case the beneficiary possesses and enjoys the income during the life of the grantor, but possession and enjoyment of income is not possession and enjoyment of the principal which produces that income. It seems to me that the plain wording of the statute is enough to fix taxability upon the entire corpus of the property passing by this trust deed, even if the entire income derived therefrom had gone to the beneficiaries from and after the delivery of the deed, because, by the terms of the deed, the corpus was intended to pass into the possession and enjoyment of the beneficiaries at or after the death of the grantor.

Moreover the dictum in the *Cochrane Case* overlooks the rule previously announced by the Appellate Division in the case of *In re Cruger,* 54 App. Div. 405, 66 N. Y. Supp. 636, affirmed by the Court of Appeals in 166 N. Y. 602, and subsequently adhered to in the matter of *In re Dunlap's Estate,* 205 App. Div. 128, 199 N. Y. Supp. 147. The *Patterson Case* was affirmed by the Appellate Division, 146 App. Div. 286, 130 N. Y. Supp. 970, and per curiam by the Court of Appeals, 204 N. Y. 677.

This Court has said that the trusts under which the beneficiary comes into possession at the death of a third person are of a testamentary character, and that until the possession comes in the gift is not complete.

Scholey v. *Rew,* 23 Wall. 331.
Wright v. *Blakeslee,* 101 U. S. 174.
Clapp v. *Mason,* 94 U. S. 589.
Mason v. *Sargent,* 104 U. S. 689.

The instant case is much stronger, for here in the normal and expected course of events the beneficiary could not come into possession, could not use, and could not know that he would ever have the possession or use until after the founder of the trust dies. Until then all the ordinary incidents of ownership are postponed. There is no possession or enjoyment until after the death of the donor, but there is a post-mortem disposition of property. Such a transaction is testamentary in character, and therefore not only within the letter of the Act but also within its spirit and intent.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals for the Eighth Circuit in this case should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
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THOMAS H. LEWIS, JR.,
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FEBRUARY, 1927.

APPENDIX

Mr. John H. Caldwell, a witness for the plaintiff and an officer of the United States Trust Company, testified that the reasons Mr. Shukert gave for creating this trust were (R. 40):

> He said this was an arrangement he made for the future of his family, I do recall that I said to him that it was a very large sum. I said to him at the time, I said, I hope you are not "trusting" your whole estate, and you do not want to tie up more than you can afford to. He said, oh no, I have much more than this, but this is something I am putting aside for the future of my family to see that they will never come to want. It is a provision I am making for them.

Mr. R. W. Harber, also a witness for the plaintiff, and the confidential adviser of Mr. Shukert in his lifetime, testified (R. 46):

> Q. Did he talk with you or consult with you about it?
>
> A. Yes, we discussed the terms, and I expressed surprise at the duration of it. That was a thirty-year period.
>
> Q. What did he say about that?
>
> A. Well, all that I recall now is that it was making provision for the family, and in no way affected his estate because he had such a large amount left and it would not interfere with any plans he had in mind for going ahead with other business arrangements.

On cross-examination Mr. Harber testified as follows (R. 47, 48):

> Q. You say you were surprised at the duration of this trust. I presume you mentioned it to Mr. Shukert?
>
> A. I did.
>
> Q. You doubtless told him that by the time the children came to the enjoyment of this property that he would be dead, or something of that kind?
>
> A. I said something about the age of the beneficiaries, and I may have said something about him being dead at the termination of the trust, but I do not recollect that, but I would not say I did not say it.
>
> Q. At any rate that was not a material point in creating the trust?
>
> A. No.
>
> Q. He did not expect to live for thirty years. That had not anything to do with the trust?
>
> A. I had no way of knowing of course, but I did not believe that he would live that long.
>
> Q. In fact, was his plan to make these trust provisions—to defer these trust provisions so that if his children should dissipate or lose the money which came from his estate, or from him, that they would in their middle life be taken care of by this trust fund?
>
> A. I suppose that was it.
>
> Q. Well, didn't he say that?
>
> A. Well, practically said that was what would happen.

Miss Isabel C. Shukert, one of the plaintiffs, testified (R. 64):

> Q. Did you talk about that thirty-year provision?
>
> A. Yes.

Q. What did he say about it?

A. I think his idea in making that——

Q. (Interrupting.) No, beg your pardon—what did he say about it?

A. So that we would have something in our old age.

Q. He said that he wanted you to have something in your old age?

A. Yes, and in connection with that he mentioned fortunes which had been squandered.

Mr. Cutler, a witness on behalf of the plaintiff and an officer of the Trust Company, testified (R. 102, 103):

A. Yes, those subjects quite often come up in such matters. I rather questioned Mr. Shukert's idea of leaving this amount of money tied up in such a manner for such a long term, which was thirty years. Mr. Shukert said that he was good for fifteen or twenty years and that in five or ten years he would be able to know more about the children's business ability and that Miss Isabel's business ability had been proven to him. As far as I knew he had entire confidence in her ability, but the younger daughter was in school and the boy was in the Omaha schools and the other daughter out of the city and he said that in five or ten years he would be able to get a better line on their business ability and at that time could make new arrangements if necessary.

Q. What did he say about the balance of his property—did you find out about the size of his estate in talking with him there?

A. I had a very good idea of the size of his estate.

Q. Now what was said about the placing of this in trust, whether the children would need these funds?

A. He said that he had plenty of money with which to take care of his children until that time, and I even had questioned why he, what he meant by that, and he said he could take care of them in the meantime and he would make provision so that in their old age they could have this to fall back on, provided that in the new arrangement they should dispose of all of it.

In cross-examination Mr. Cutler further testified (R. 105, 106):

A. Well, just when I questioned his idea of tying this up for thirty years.

Q. That was his idea—

A. (Interrupting.) He said, "I am good for fifteen or twenty years, so it doesn't make any difference; I can take care of them until that is up."

Q. I don't see how that has any bearing on the thirty-year provision?

A. My idea of that was that if he could take care of them for fifteen or twenty years that the estate that he would leave would surely cover the interim.

Q. He spoke of the fact that if they should dissipate the funds they would be cared for in their old age, didn't he?

A. Yes.

Q. In other words, he contemplated they would come into possession of his main fortune, and if they should dissipate that in their younger lives they would still have this?

A. If they should dissipate it between the time they came into possession of it and the end of the thirty years.

Q. That some time they would come into possession of his major estate, that is, the part he did not put into this trust?

A. The other funds.

Q. And that if they should mismanage and dissipate that large part of his fortune, still, in their old age, they would be taken care of by this trust fund?

A. Yes, sir.

Q. That is what he had in mind?

A. I think so.

Q. No doubt about that, is there?

A. Not in my mind.

The evidence of these witnesses is undisputed

○